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Oscar v. University Students Cooperative Ass'n: Can Citizens Use RICO to Rid Neighborhoods of Drug Houses

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Comments

Oscar v. University Students Cooperative Ass'n: Can Citizens Use RICO to Rid Neighborhoods of Drug Houses?

> Organized crime threatens the security of the Nation by terrorizing, through physical and economic threats, the innocent businessman and the individual citizen. One of the most pernicious threats posed by organized crime is . . . [the corruption of] the hope of our Nation with deadly narcotics and dangerous drugs. It is time for us to muster our forces and fight to save our society . . . .[1]

I. INTRODUCTION

Drug houses blight neighborhoods and endanger residents;[2] however, neighborhoods are fighting back[3] against

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1 116 CONG. REC. 602 (1970) (statement of Sen. Hruska).

2 *See* Monte R. Young & Michael Slackman, *Cracks in the Laws: Officials Say They Lack Tools to Shut Drug Dens for Good*, Newsday, May 6, 1990, *available in* LEXIS, Nexis Library, Omni File ("One crack house in a community can drastically change the character of a neighborhood . . . . A constant parade of users and dealers marching in and out of the front door brings with it increased burglaries, robberies, prostitution, traffic, noise and litter.").

The drug problem is particularly acute in public housing:

> The accounts of the residents paint a grim picture. Many said that crime and drugs have become so bad in their neighborhoods or buildings that they have become virtual hostages in their own homes. In many high-rise public housing developments, the streets have come indoors; hallways and stairwells have taken on the look of the worst avenues and alleys outside of the building. Local police simply do not have the manpower or resources to keep up. When they direct their efforts toward one development, the dealers and purchasers simply pack up and move to another.

Drugs and Public Housing: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 101st Cong., 1st Sess. 4-5 (1989) (statement of Sen. Roth).

3 *See Judge Sympathizes with Crackhouse Arsonist*, UPI, Sept. 28, 1989, *available in* LEXIS, Nexis Library, Omni File (Woman, enthusiastic about President Bush's anti-drug speech, torched crack house.); *Suspect Denies Setting Crackhouse Fire*, UPI, Aug. 25, 1989, *available in* LEXIS, Nexis Library, Omni File ("Neighbors cheered when someone torched

drugs—America's modern nuisance.[4] Historically, law enforcement officials used nuisance laws to shut down bawdy houses and gambling dens;[5] today, they use nuisance laws to shut down drug houses.[6] Indeed, in several states, drug-related facilities are nuisances per se.[7] Additionally, when public officials do not act, private citizens have begun to use nuisance laws against drug houses.[8]

Recently, the Ninth Circuit Court of Appeals, in *Oscar v. University Students Cooperative Ass'n*,[9] added a new and powerful weap-

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the [crack]house.").

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> Without question, our Nation faces a formidable threat to its existence due to our abysmal failure to control illegal drug use. Over the past few decades, through inattention or perhaps self-delusion, we have allowed an intolerable situation to reach crisis proportions. However, it is important to emphasize that mere numbers and pertinent statistics on drug-related crime . . . cannot properly convey . . . the tragic sense of family loss, the stark element of fear and the hopeless conditions which characterize many . . . communities throughout the Nation.

Hearings Before the Select Comm. on Narcotics Abuse and Drug Control, 101st Cong., 1st Sess. 75 (1989) (statement of Kimi O. Gray, Chairperson, National Association of Resident Management Corporations; Chairperson, Dept. of Public and Assisted Housing [DPAH]; Resident Advisory Board and Chairperson, Kenilworth/Parkside Resident Management Corporation); *see also* A. Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of Possible Convergence of the Rational Theory and National Policy*, 42 VAND. L. REV. 725, 727 (1989) ("By any rational measure, the supply-side 'war against drugs' has failed. Only ten to fifteen percent of the illicit drugs entering the country are intercepted and the most popular illegal substances, like cocaine, remain readily available to the American public.").

5 *See, e.g.*, Clopton v. State, 105 S.W. 994 (Tex. Civ. App. 1907).

6 *See, e.g.*, English v. State *ex rel.* Purvis, 585 So. 2d 910 (Ala. 1991) (Defendant appealed conviction for public nuisance caused by conducting "drug hangout."); People v. 21020 Colorado Highway 74, 791 P.2d 1189 (Colo. Ct. App. 1989), *cert denied*, No. 90SC82, 1990 Colo. LEXIS 420, (Colo. June 11, 1990) (Defendant appealed holding that public nuisance existed because of drug distribution on premises.).

7 *See, e.g.*, COLO. REV. STAT. ANN. § 16-13-303(1)(C)(I), (II) (West 1990 & Supp. 1991); IOWA CODE ANN. § 657.2(6) (West 1987); MICH. COMP. LAWS ANN. § 600.3801 (West 1987 & Supp. 1991); MISS. CODE ANN. § 95-3-1 (Supp. 1991); N.C. GEN. STAT. § 19-1 (Supp. 1991); OR. REV. STAT. § 105.555(1)(C) (1990); TEX. CIV. PRAC. & REM. CODE ANN. §§ 125.001, .021, .041 (West Supp. 1992).

8 *See, e.g.*, State *ex rel.* Freeman v. Pierce, 573 N.E.2d 747 (Ohio Ct. App. 1991) (Christian men's organization brought public nuisance suit in state's name against property owner conducting drug activities.); Reynolds Holding, *Rooming House Is a 'Nuisance,' Neighbors Tell Court in SF*, S.F. CHRON., May 15, 1991, at A15 (Thirty-seven neighbors from a San Francisco neighborhood sued the owner of a rooming house, in small claims court, which allegedly operated as a public nuisance because of drug activity. Each plaintiff claimed $5000 in damages.); Marja Mills, *Court Shuts Drug House for a Year*, CHIC. TRIB., November 2, 1990, at 1 (Association of Chicago neighborhoods sued a drug house for public nuisance and succeeded with a one year abatement.).

9 939 F.2d 808 (9th Cir. 1991).

on to the war on drugs. In *Oscar*, a group of apartment tenants sued their neighbors, alleging the neighbors' drug dealing activities interfered with the use and enjoyment of the tenants' property. The tenants brought their claim under the Racketeer Influenced and Corrupt Organizations Act (RICO),[10] which allows recovery of treble damages and attorneys' fees for an injury to business or property which is caused by a racketeering activity.[11] In *Oscar*, the district court dismissed the suit because plaintiffs failed to show that defendants' activities caused an injury to their leasehold.[12] A panel of the Ninth Circuit partly reversed the district court's decision.[13] The Ninth Circuit later vacated the panel's opinion and will rehear the case en banc.[14] Part I of this Comment introduces drug houses as nuisances. Part II reviews the facts and holding of the *Oscar* decision. Part III discusses RICO and its legislative history. Part IV analyzes the RICO standing requirements at issue in *Oscar*, and Part V analyzes *Oscar's* dissent and the application of California nuisance law to *Oscar*. Part VI urges the Ninth Circuit to affirm the *Oscar* panel's holding.

II. FACTS AND HOLDING: *OSCAR V. UNIVERSITY STUDENTS COOPERATIVE ASS'N*

Tenants in nearby apartment buildings sued the University Students Cooperative Association and certain residents of Barrington Hall in Berkeley, California.[15] The tenants alleged that Barrington Hall residents conducted drug activities which interfered with the use and enjoyment of the tenants' leasehold.[16] The defendants' alleged activities included drug distribution and drug use.[17] In fact, Barrington Hall was reputedly the "last bas-

10 18 U.S.C. §§ 1961-1968 (1988).

11 *Id.* § 1964(c).

12 *Oscar*, 939 F.2d at 810.

13 *Id.* at 814. The Ninth Circuit panel found certain of the alleged injuries were not caused by the racketeering conduct. *Id.* at 813.

14 Oscar v. University Students Coop. Ass'n., No. 90-15750, 1992 WL 3260 (9th Cir. Jan. 10, 1992) (en banc).

15 Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 809 (9th Cir. 1991).

16 *Id.*

17 *Id.* at 810 (citations omitted). The plaintiffs further alleged that many individuals and enterprises operated out of Barrington Hall. As a point of interest, examples of the individuals' names include "Mushroom Dave," "Icepick Al," "Onngh Yanngh," and "Marybeth (a.k.a. Scarymeth)." *Id.* at 812-13.

tion of [the] sixties counterculture"[18] and was known nationally as a "drug den and anarchist household."[19] The plaintiffs "claim[ed] that the co-op's residents conducted drug deals and posted lookouts in front of plaintiff's apartments bothering them and making it look like they, too, were dealing drugs; and that Barrington's residents . . . regularly dumped the bodies of persons suffering drug overdoses onto the sidewalks near neighboring apartments."[20]

The district court dismissed plaintiffs' complaint for lack of causation,[21] but the Ninth Circuit partly reversed the decision.[22] The Ninth Circuit concluded that plaintiffs' leasehold was a sufficient property interest[23] to satisfy the RICO standing requirement of an injury to business or property.[24] The court further held that the residents' drug activities directly caused injury to plaintiffs' property by interfering with the use and enjoyment of the leasehold[25] and remanded for trial.[26] However, the Ninth Circuit then vacated this decision to rehear it en banc.[27]

III. RICO AND ITS LEGISLATIVE HISTORY

In 1970, Congress enacted the Organized Crime Control Act (OCCA) in which Title IX is the Racketeering Influenced and Corrupt Organizations Act (RICO). RICO sought the "eradication

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18 *Id.* at 809.

19 *Id.* (citing Sam Whiting, *The Co-Op That Chaos Killed*, S.F. CHRON., April 9, 1990, at B3). Allegedly, Barrington Hall residents led an "alternative" lifestyle featuring nude dinners with themes such as "Satan's Village Wine Dinner and the Cannibal Wine Dinner—the latter complete with body-part shaped food." *Id.* at 810 (citing Whiting, *supra*, at B4). These and other activities brought Barrington Hall to the attention of the media and police. *See, e.g.*, Debra Holtz, *UC Student Housing Co-Op Wins Fight to Evict Tenants*, S.F. CHRON., March 23, 1990, at A4 ("In the past three weeks, one resident died after falling from the roof of the building and a riot culminated in violent clashes with police and extensive property damage."); Jim H. Zamora, *Barrington Hall, Once Hotbed of UC Radicalism, Closes*, L.A. TIMES, April 10, 1990, at P3 (Confrontation between police and 500 people erupts at Barrington Hall.); *The State*, L.A. TIMES, October 18, 1987, at 2 (Barrington Hall attracted attention when seven people were taken to the hospital after consuming LSD-spiked punch.).

20 *Oscar*, 939 F.2d at 810.

21 *Id.*

22 *Id.* at 814.

23 *Id.* at 811.

24 18 U.S.C. § 1964(c) (1988).

25 *Oscar*, 939 F.2d at 810.

26 *Id.* at 814.

27 Oscar v. University Students Coop. Ass'n, No. 90-15750, 1992 WL 3260 (9th Cir. Jan. 10, 1992) (en banc).

of organized crime . . . by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[28] Congress provided broad sanctions under RICO including "imprisonment, forfeiture, injunctions, and treble damage relief for 'person[s] injured' in their 'business or property' by violations of the statute."[29] However, RICO does not apply solely to organized criminals.[30] Rather, RICO prohibits activities characteristic of organized crime, not the status of being a member of an organized criminal enterprise.[31] Therefore, RICO has a

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28 Organized Crime Control Act of 1970, Pub L. No. 91-452, 84 Stat. 922, 922-23 (1970). The Congressional Statement of Findings and Purpose provided in part:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and to corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Id.

29 G. Robert Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 703 (1990) (citations omitted).

30 H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989) ("Congress . . . chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."). Also,

> [p]rivate civil actions under the statute are [not] being brought . . . solely against the archetypal, intimidating mobster. Yet this defect-if defect it is-is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult application.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (citations omitted).

31 *See* Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) ("We are convinced that the better reasoned approach is one which rejects any attempt to interpret RICO as creating a status offense aimed only at organized crime in any colloquial sense of that

broader reach than its name indicates.[32] Additionally, a majority of states have adopted "Little RICO" statutes which combat organized crime activities.[33]

IV. THE *OSCAR* COURT'S ANALYSIS OF RICO STANDING REQUIREMENTS

A. Injury to Property

The *Oscar* plaintiffs sued for recovery under the RICO civil remedy provision. The elements of a civil RICO claim[34] are (1) an injury to business or property (2) by reason of (3) a pattern of

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phrase."); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollerscheim*: Will Civil RICO Be Effective Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 534 (1987); Betty Gloss, Note, *The Continuing Conflict Over Limitations on RICO's Civil Injury Element*, 20 VAL. U. L. REV. 531, 558 (1986).

32 In fact, Congress mandated that the courts construe RICO broadly. Organized Crime Control Act of 1970, Pub L. 91-452, § 904(a), 84 Stat. 922, 947 (1970). *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1031-32 (1980) (supporting idea that RICO should be construed broadly). Additionally, see G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982) for a comprehensive analysis of RICO's legislative history.

33 ARIZ. REV. STAT. ANN. §§ 13-2301 to -2317 (1989 & Supp. 1991); CAL. PENAL CODE §§ 186-186.8 (West 1988 & Supp. 1991); COLO. REV. STAT. ANN. §§ 18-17-101 to -109 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985); DEL. CODE ANN. tit. 11, §§ 1501-1511 (1987 & Supp. 1990); FLA. STAT. ANN. §§ 895.01-.09 (West Supp. 1991); GA. CODE ANN. §§ 16-14-1 to -15 (Michie 1988 & Supp. 1991); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1991); IDAHO CODE § 18-7801 to -7805 (1987 & Supp. 1991); ILL. ANN. STAT. ch. 56-1/2 ¶¶ 1651-1659 (Smith-Hurd 1985 & Supp. 1991); IND. CODE §§ 35-45-6-1 to -2 (Supp. 1991); LA. REV. STAT. ANN. §§ 15:1351-:1356 (West Supp. 1991); MINN. STAT. ANN. §§ 609.902-.912 (West Supp. 1991); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1990); NEV. REV. STAT. ANN. §§ 207.350-.520 (Michie 1986 & Supp. 1991); N.J. REV. STAT. §§ 2C:41-1 to :41-6.2 (West 1982 & Supp. 1991); N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie 1989 & Supp. 1991); N.Y. PENAL LAW §§ 460.00-.80 (McKinney 1989); N.C. GEN STAT. §§ 75D-1 to -14 (1990); N.D. CENT. CODE §§ 12.01-06.1 to -06.8 (1985 & Supp. 1991); OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1987 & Supp. 1991); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1991); OR. REV. STAT. §§ 166.715-.735 (1990 & Supp. 1990); 18 PA. CONS. STAT. ANN. § 911 (1983 & Supp. 1991); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985 & Supp. 1991); UTAH CODE ANN. §§ 76-10-1601 to -1609 (1990 & Supp. 1991); WASH. REV. CODE ANN. §§ 9A.82.001-.904 (West 1988 & Supp. 1991); WIS. STAT. ANN. §§ 946.80-.87 (West 1991); *see also* Douglas Abrams, *Civil Rico's Cause of Action: The Landscape After* Sedima, 12 TUL. MAR. L.J. 19, 24 n.29 (1987); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God-Is This the End of RICO?"*, 43 VAND. L. REV. 851, 988-1011 (1990).

34 18 U.S.C. § 1964(c) (1988) provides "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

racketeering[35] (4) which involves a violation of section 1962.[36]

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35 A full discussion of the pattern requirement is beyond the scope of this Comment. The *Oscar* court's only reference to the pattern requirement was that the *Oscar* parties agreed that the "repeated sales of narcotics . . . amounted to a 'pattern of racketeering activity.'" Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 810 (9th Cir. 1991). With regard to the pattern requirement, in H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989), the Court stated, "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal authority." Further, RICO defines a pattern of racketeering as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering." 18 U.S.C. § 1961(5) (1988). Racketeering activity is

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . . (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

Id. § 1961(1).

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> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1988); *see also* DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO 17 (1991).

An enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1988). Full analysis of the enterprise requirement is also beyond the scope of this Comment. The court's only reference to the enterprise requirement was that "[p]laintiffs allege precisely the type of conduct RICO was meant to deter—the continuous operation of a drug distribution enterprise." Oscar v. University Students

Essentially, the *Oscar* controversy concerns the standing required to bring a civil RICO suit. The *Oscar* controversy raises two issues: (1) Do plaintiffs have a property interest sufficient to satisfy the section 1964(c) requirement; and (2) Did defendants' conduct cause the injury to plaintiffs' property?

In *Sedima, S.P.R.L. v. Imrex Co.*,[37] the Supreme Court stated that a "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."[38] As an initial matter, plaintiffs must allege the existence of a property interest to have standing under RICO. Unfortunately, RICO does not define property, and civil RICO cases rarely raise the issue of whether a property interest exists. This case law silence likely stems from the fact that the parties do not dispute the existence of a property right.[39]

Because RICO does not define property, the *Oscar* court looked to state law to determine if a property interest existed.[40] Indeed, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[41]

Coop. Ass'n, 939 F.2d 808, 813 (9th Cir. 1991).

For an in-depth analysis of the RICO enterprise requirement see ABRAMS, *supra*, at 173-258 (1991). *See generally* Michael A. Gardiner, *The Enterprise Requirement: Getting to the Heart of Civil RICO*, 1988 WIS. L. REV. 663 (1988); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

37 473 U.S. 479 (1985).

38 *Id.* at 498.

39 In the following RICO cases, courts found that the pleadings properly alleged property was damaged without analyzing whether a property interest existed: Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir.) (medical equipment), *cert. denied*, 493 U.S. 901 (1989); Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498-99 (9th Cir. 1985) (depleted insurance proceeds); R.A.G.S. Coutoure, Inc. v. Hyatt, 774 F.2d 1350, 1354 (5th Cir. 1985) ("business interruptions and expenses"); Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516 (2d Cir. 1984) (monetary loss), *vacated and remanded*, 473 U.S. 922 (1985), *on remand*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); Bennett v. Berg, 685 F.2d 1053, 1058 (8th Cir. 1982) (reduced value of contract), *rev'd in part on other grounds and aff'd in part en banc*, 710 F.2d 1361 (8th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); Georgia Gulf Corp. v. Ward, 701 F. Supp. 1556, 1559 (N.D. Ga. 1987) (lost profits); Wang Lab., Inc. v. Burts, 612 F. Supp. 441, 444 (D. Md. 1984) ("business reputation and loss of customer goodwill"); Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 990 (D.N.J. 1984) (Defendants conceded "injury to land[,] . . . diminution in market value of property[,] . . . [and] loss of use of property" are recoverable.).

40 Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 810-11 (9th Cir. 1991).

41 Courts have looked to state law to determine whether a property interest existed in other federal areas. *See* Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (determining if trade secret was property for purposes of the taking clause, the court looked to state law) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)

Furthermore, federal courts have looked to state law for interpretive guidance in other RICO areas. For example, if a corporation is injured by a racketeering activity and its stock value plummets, federal courts have looked to state corporate law to determine whether a shareholder has a cause of action against the racketeers for a diminution in stock value or whether the cause of action lies solely with the corporation.[42] In *Leach v. Federal Deposit Ins. Corp.*,[43] the court stated:

> this incorporation of state law into federal law (RICO standing in regard to shareholders) implicates a serious problem of uniformity of federal law throughout the states. However, on balance, the incorporation of state law to determine whether a shareholder has been injured under RICO is preferable to generating federal common law in this area. Any definition of the term property, an inherently state law-related term, should look to state law.[44]

The Third Circuit reached a similar result on the issue of shareholder standing: "Unless state law on the issue of the derivative nature of plaintiffs' claim is inconsistent with the federal policy underlying RICO, it should not be displaced simply because plaintiffs base their claim on a federal statute."[45] The Third Cir-

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(citations omitted)); Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Milens v. Richmond Redev. Agency, 665 F.2d 906, 909 (9th Cir. 1982) (We look to "state law to determine what property rights exist . . . ."); *but see* Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990). In *Berg*, the court concluded that an insurance policy constituted property under RICO. However, the court did not solely look to state law but referred to California law and prior Ninth Circuit bankruptcy precedent. *Id.* at 464 (referring to *In re* Minoco Group of Cos., Ltd., 799 F.2d 517, 519 (9th Cir. 1986) and *In re* Mendenhall's Estate, 6 Cal. Rptr. 45, 47 (Cal. Ct. App. 1960)).

42 Leach v. Federal Deposit Ins. Corp., 860 F.2d 1266 (5th Cir. 1988), *cert denied*, 491 U.S. 905 (1989); *see also In re* Sunrise Sec. Litig., 916 F.2d 874, 879 (3d Cir. 1990) (citing Burks v. Lasker, 441 U.S. 471, 480 (1979)); Flynn v. Merrick, 881 F.2d 446, 450 (7th Cir. 1989); Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347, 349 (5th Cir. 1989), *cert denied*, 485 U.S. 905 (1988). However, several courts have simply referred to general corporate law without explanation. *See, e.g.*, Rylewicz v. Beaton Servs. Ltd., 88 F.2d 1175, 1179 (7th Cir. 1989); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987); *but see* Rand v. Anaconda-Ericcson, Inc., 794 F.2d 843, 849 (2nd Cir. 1986), *cert. denied*, 479 U.S. 987 (1986) (referring to antitrust law).

43 860 F.2d 1266 (5th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

44 *Id.* at 1274 n.14 (referring to Recon. Fin. Corp. v. Beaver County, 328 U.S. 204 (1946)).

45 *In re* Sunrise Sec. Litig., 916 F.2d 874, 879 (3d Cir. 1990) (referring to Burks v.

cuit noted the benefits of such an approach: "Absent inconsistency with federal policy, federal courts are relieved 'of the necessity to fashion an entire body of federal corporate law out of whole cloth.'"[46] Likewise, the courts need not fashion a body of federal property law under RICO. Indeed, recognizing the tenants' claim is consistent with RICO's deterrent goal.[47] Thus, because RICO is silent on the definition of property and federal courts have looked to state law in other RICO areas, the *Oscar* court appropriately determined the existence of a property interest according to California law.[48]

Under California law, a tenant has a proprietary interest in a leasehold. "A lease has a dual character. It is a conveyance of an estate in the land and a contract between the lessor and the lessee for the possession and use of the property in consideration of rent."[49] Although it is not real property itself, a lease is an estate in real property.[50] The tenant can maintain an action for injury to the leasehold[51] because any interest constituting a property interest provides sufficient standing to sue for interference with the enjoyment of the property.[52] The tenant's claim for injury to the property interest is distinct from the right of the landlord to maintain an action for injury to the reversion.[53] Therefore, under California law the tenants have an adequate property interest for section 1964(c) standing.[54]

Lasker, 441 U.S. 471, 478-79 (1979)).

46 *Id.* (citing *Burks*, 441 U.S. at 480.).

47 *See Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 140-41 (1985) for a discussion of RICO's deterrent goal. Additionally, property should be interpreted expansively in light of Congress' mandate to construe RICO broadly. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

48 Although the defendants argued that plaintiffs had no RICO injury because plaintiffs' property was not commercial, both the majority and the dissent agreed that a competitive injury is not required. Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 811, 814 (9th Cir. 1991); *see also* Sedima, S.P.R.L. v. Imrex, Co., 473 U.S. 479, 497 n.15 (1985).

49 Parker v. Superior Court, 88 Cal. Rptr. 352, 354 (Cal. Ct. App. 1970).

50 *Id.*

51 Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 356 (Cal. Ct. App. 1971)(citations omitted); 42 CAL. JUR. 3d § 54 (1978) (protection of property rights).

52 *Venuto*, 99 Cal. Rptr. at 356; Institoris v. City of Los Angeles, 258 Cal. Rptr. 418, 424 (Cal. Ct. App. 1989); Buchanan v. Los Angeles County Flood Control Dist., 128 Cal. Rptr. 770 (Cal. Ct. App. 1976).

53 Both the landlord and tenant have distinct property interests. The landlord's property interest rests in the reversion and the tenant's property interest rests in the present possessory right. *See* Hayden v. Consolidated Mining & Dredging Co., 84 P. 422 (Cal. Ct. App. 1906).

54 Judge Rymer, dissenting, argued that a "tenant's right to quiet enjoyment derives

B. Causation

Once plaintiffs have shown the existence of a property right, the next requirement for standing to sue under civil RICO is proof that a property injury was caused "by reason of" a section 1962 violation.[55] The Supreme Court elaborated on this causation requirement in *Sedima, S.P.R.L. v. Imrex, Co.*[56] The Court stated that "the compensable injury necessarily is the harm caused by the predicate acts sufficiently related to constitute a pattern . . . ."[57] Further, "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts."[58]

Lower courts have given the causation requirement various interpretations.[59] One line of cases focuses on whether the racketeering activity causes a direct or indirect injury to the plaintiff.[60]

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solely from a warranty by the lessor, against her own acts . . . ." Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 814 (9th Cir. 1991). Under CAL. CIV. CODE § 1927 (West 1985), the lessor covenants against acts which interfere with the quiet enjoyment of the lessee. The covenant covers only the lessor's acts, not third party's acts. *See also* Marchese v. Standard Realty & Dev. Co., 141 Cal. Rptr. 370, 374 (Cal. Ct. App. 1977) (citing Carty v. Blauth, 147 P. 949 (Cal. 1915)); Lost Key Mines, Inc. v. Hamilton, 241 P.2d 273 (Cal. Ct. App. 1952). However, plaintiffs did not sue for the breach of a covenant. Rather, plaintiffs sued for disturbance of their common law property right to be free from interference with the use and enjoyment of their property. A tenancy is a sufficient interest for standing. *Institoris*, 258 Cal. Rptr. at 424. The right to use and enjoyment of property arises from ownership of the property, not a covenant. *Oscar*, 939 F.2d at 812 (referring to W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 87, at 619 (5th ed. 1984)[hereinafter PROSSER & KEETON]); *see also* People v. Mason, 177 Cal. Rptr. 284, 287-88 (Cal. Ct. App. 1981).

55 18 U.S.C. § 1964(c) (1988).

56 473 U.S. 479 (1985).

57 *Id.* at 497.

58 *Id.* (citation omitted). However, "[a] defendant who violates § 1962(c) is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Id.* (citing Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 388 (1984), *aff'd on other grounds*, 473 U.S. 606 (1985)); *see generally* ABRAMS, *supra* note 36, at 138.

59 *See* Sperber v. Boeksy, 849 F.2d 60, 64 (2d Cir. 1988)("'[D]espite the manifold attempts which have been made to clarify the subject [of proximate cause, there is not] yet any general agreement as to the best approach' either in torts or as applied to RICO.") (citations omitted).

60 *See In re* Sunrise Sec. Litig., 916 F.2d 874, 879 (3d Cir. 1990); Pujol v. Shearson/Am. Express, Inc., 829 F.2d 1201, 1205 (1st Cir. 1987) (holding that predicate acts did not directly cause whistleblower's job termination); Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985) (stating that higher county taxes did not confer standing on taxpayers for RICO claim against criminals who bribed county officials); *see also* Laura Ginger, *Causation and Civil RICO Standing: When is a Plaintiff Injured "By Reason of" a*

Another line rejects this distinction and focuses on whether proximate cause can be proven between the injury and the action.[61] One reason for the rejection of the direct-indirect injury requirement is that it is too "restrictive."[62] Indeed, RICO does not distinguish between direct and indirect injuries which flow from the predicate acts.[63] Rather, the question is whether the injury itself flows from the commission of the predicate acts.[64]

In *Oscar*, the court followed previous Ninth Circuit precedent[65] and applied the proximate causation line of analysis. The court held that plaintiffs had adequately pleaded causation:

> [T]he racketeering conduct complained of was the direct cause of the alleged injuries. According to the complaint, the racketeers themselves interfered with plaintiffs' use and enjoyment by distributing narcotics on and around plaintiffs' property. Furthermore, plaintiffs alleged that overdose victims languished about the neighborhood because the racketeers were trying to conceal their illegal conduct. The injury was thus the direct consequence of the racketeering activity; there were no inter-

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RICO Violation, 64 ST. JOHN'S L. REV. 849, 858-59 (1990).

61 *See* Zervas v. Faulkner, 861 F.2d 823, 832-35 (5th Cir. 1988); Brandenburg v. Seidel, 859 F.2d 1179, 1187-90 (4th Cir. 1988); *Sperber*, 849 F.2d at 64; Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) ("This causation requirement might not be subtle, elegant or imaginative, but . . . it is based on a straightforward reading of the statute as Congress intended it to be read."), *aff'd on other grounds*, 473 U.S. 606 (1985).

62 "A requirement that the nexus between the injury and a predicate act be 'direct' may, at least in some circumstances, be overly restrictive." *Zervas*, 861 F.2d at 833. "In *Sedima*, the Court, in a footnote to its statement that recoverable damages are those which 'flow from the commission of the predicate acts,' stated that '[s]uch damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery.'" *Id.* (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)). A competitive injury example given in the dissent is "that of a business which conducts its affairs through a pattern of racketeering activity 'to enhance its profits or perpetuate its economic power,' in which event 'competitors of that enterprise could bring civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts.'" *Id.* (citing *Sedima*, 473 U.S. at 522.). Under a strict interpretation of the direct/indirect causation analysis, the competitor would not be able to recover as the competitor was injured indirectly.

63 *See* Alexander Grant & Co. v. Tiffany Indus., Inc., 770 F.2d 717, 719 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

64 *See* Bass v. Champagnone, 838 F.2d 10, 12 (1st Cir. 1988).

65 Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990), *cert. granted sub nom.* Holmes v. Securities Investor Protection Corp., 111 S. Ct. 1618 (1991). In *Vigman*, a case involving securities fraud, the court stated that plaintiffs "must establish a causal connection between the alleged predicate acts of securities fraud and the losses they seek to recover. But in doing so, they need satisfy only the requirements of proximate cause as understood in a typical tort claim." *Id.* at 1468.

> vening causes or actors, and the harm was strictly foreseeable. The blighting of a neighborhood by the fallout from a racketeering enterprise seems to be the type of harm well within the contemplation of the statutory drafters. Causation was adequately pleaded.[66]

To prove causation, the plaintiffs must show "factual (but for) causation and . . . legal (proximate) causation of the alleged injury."[67] However, proximate cause limits legal liability stemming from factual causation through the use of "a policy . . . 'whether the conduct has been so significant and important a cause that the defendant should be held responsible.'"[68] Proximate cause factors include foreseeability of the harm, intervening causes, and direct causality.[69]

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66 Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 813 (9th Cir. 1991). The court also stated:

> The complaint alleges that residents of Barrington Hall conducted drug sales and posted look-outs in front of plaintiffs' apartments and in their carports. This, they contend, interfered with the use and enjoyment of their property by making them fear for their safety and by making it appear that their apartments were a source of drugs . . . . In addition, they claim that Barrington Hall's residents regularly disposed of overdose victims by dumping them in front of the building instead of summoning emergency assistance, all in an effort to conceal their nefarious activities.

Id.

67 Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740, 744 (5th Cir. 1989). *See* Norman v. Niagara Mohawk Power Corp., 873 F.2d 634 (2d Cir. 1989); Old Time Enter. v. International Coffee Corp., 862 F.2d 1213, 1218 (5th Cir. 1989); Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988); Grantham & Mann, Inc. v. American Safety Prods., Inc., 831 F.2d 596, 606 (6th Cir. 1987).

Also, in PROSSER & KEETON, *supra* note 54, § 41, at 264 the authors state:

> Proximate cause . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond but any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts . . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.

Id.

Proximate cause includes cause-in-fact and legal cause. With regard to legal cause, many courts use the "but for" test. At most, the but for test is a rule of exclusion. If the plaintiff shows but for causation, further analysis is necessary to determine if, as a policy issue, liability should be imposed. However, if the but for test is not met, proximate cause does not exist. *Id.* § 41, at 266.

68 *Id.* (quoting PROSSER & KEETON, *supra* note 54, § 42, at 272).

69 Brandenburg v. Seidel, 859 F.2d 1179, 1189. The restatement adopted the substantial factor test to determine legal cause. RESTATEMENT (SECOND) OF TORTS § 431

Plaintiffs adequately pleaded cause-in-fact because no intervening causes existed and plaintiffs would not have lost the use and enjoyment of their property *but for* the defendants' drug activity. Also, as a policy matter, the Ninth Circuit (en banc) should affirm the *Oscar* holding that plaintiffs adequately pleaded causation. The drug activity is closely connected to the interference with the use and enjoyment of the property and Congress specifically wanted to eradicate drug activity.[70] Furthermore, imposing

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(1965). To determine whether a causal factor constitutes a substantial factor consider:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (c) lapse of time.

Id. § 433.

The substantial factor causation requirement would not change the causation analysis in *Oscar*. Defendants' drug activities are the direct and only cause of the interference with the plaintiffs' property interest.

70 115 CONG. REC. 5873 (1969) (statement of Sen. McClellan) ("Next to professional gambling, most law-enforcement officials agree that the importation and distribution of narcotics, chiefly heroin, is organized crime's major illegal activity."); *see also* 116 CONG. REC. 35199 (1969) (statement of Rep. St. Germain on S.30):

> The profits from gambling and usurious loans go into financing the deadly narcotics trade, and the profits here at the importing and wholesaling ends are as astronomical as is the cost paid for this traffic by society—in terms of human lives and the street crime motivated by the addicts' need for money to buy drugs.

Id.

The Ninth Circuit stated that the activities at Barrington Hall were

> the type of unlawful conduct that lies at the heart of RICO: the sale of illegal drugs and the crime and violence associated therewith. This is not a case where an enterprising lawyer has converted a business tort into a federal case; nor is it an ordinary landlord-tenant dispute run amok. Instead, plaintiffs allege precisely the type of conduct RICO was meant to deter—the continuous operation of a drug distribution enterprise.

Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 813 (9th Cir. 1991) (citation omitted).

liability will strengthen RICO's deterrent effect.[71] Thus, as a poli-

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71 Indeed, the Supreme Court stated, "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985).

As a policy matter, holding the defendants liable would further RICO's deterrent goal. In hearings before the Senate Judiciary Committee, Assistant Attorney General Steven S. Trott stated:

> [I]n gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myths of invulnerability that have long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in organized crime contexts . . . . Finally, *civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind.* These considerations suggest that private civil RICO enforcement in areas of the organized criminality may have had a greater deterrent impact than is commonly recognized, and . . . might be expected to produce even greater deterrence in the future.

Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 140-41 (1985)(emphasis added). Indeed, the treble damage incentive encourages citizens to bring private claims against defendants engaged in racketeering activities. In Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), the court stated:

> The delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Id. at 399 n.16.

Further, RICO claims also deter future violators.

> The law assumes that those who come before it are equal; this assumption, however, is only formally true. It is a sad fact that the relatively wealthy perpetrator is usually able to buy the claim of the relatively poor victim at a substantial discount of any figure that approaches justice . . . . Apparently, most victims are willing to settle when they are made whole and do not want to litigate for the premium . . . . Ironically, it may be necessary to authorize treble damages recovery merely to assure that deserving victims of patterns of unlawful behavior under RICO receive something close to actual damages . . . .
>
> Clearly, authorizing treble damages and attorney's fees changes the litigation equation. Appropriately, it raises the price of settlements. Clear winners will be settled quickly and for more than they would be otherwise. Trial time and other judicial resources will be saved. Clear losers may be worth more than nothing, but because they will always remain high risk ventures, they seldom will be brought. Middle area litigation is more apt to be brought, and will be worth more, but the issue, in both cases, remains whether a higher settlement is unjust.

Blakey & Perry, *supra* note 33, at 920-21 n. 189 (citations omitted); *see also* Russello v. United States, 464 U.S. 16, 28 (1983). *But see* Philip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil*

cy matter, legal causation exists.

C. *Analyzing the Dissent*

Under RICO, the harm caused by the predicate acts establishes the damages recoverable.[72] Also, the damages must be "established by competent proof . . . ."[73] However, few RICO cases have reached the damages stage.

Judge Rymer, dissenting in *Oscar*, argued that plaintiffs' RICO claim failed because they were unable to allege financial harm.[74] The majority responded that "the requirement that plaintiffs have a financial interest has no independent statutory significance; it is merely another way of articulating the requirement that plaintiffs must suffer an injury to property. Under California law, a thing may be property even if it is not marketable . . . ."[75] Therefore, the majority held that plaintiffs could recover the "diminution of the fair market value of their property interest."[76]

No RICO precedent establishes the damages which are recoverable for interference with the use and enjoyment of property. Because neither RICO itself nor case law provide damage analysis for an interference with the use and enjoyment of property, the

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RICO, 21 NEW ENG. L. REV. 1, 37 ("Indeed, it would be foolish to believe that a private citizen would have the temerity to sue a real organized crime figure for racketeering . . . ."); Geoffrey F. Aronow, *In Defense of Sausage Reform: Legislative Changes to Civil RICO*, 65 NOTRE DAME L. REV. 964, 974 (1990). The author states

> [e]veryone concedes that the statute does not provide an effective weapon for private parties to sue that type of defendant [organized crime] . . . . It borders on the absurd to think that a private citizen would have the resources, the necessary access to information and cooperative witnesses, or the temerity to sue serious organized crime figures-absent at least prior government prosecution.

Id.

72 *Sedima*, 473 U.S. at 495.

73 Fleischhauer v. Feltner, 879 F.2d 1290, 1299 (6th Cir. 1989), *cert denied*, 110 S. Ct 1122 (1990), *and cert. denied*, 110 S. Ct. 1473 (1990); *see also* Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988-91 (D.N.J. 1984) (Plaintiffs may recover only for business or property damages that are sustained.).

74 *Oscar*, 939 F.2d at 814 (Rymer, J., dissenting) (citing Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990)). In *Berg*, the court dismissed a RICO claim by corporate directors for wrongful cancellation of an insurance policy. Although the insurance policy constituted property under RICO, the court dismissed the claim for lack of injury to the property because the directors did not pay any claims while the policy was canceled. *Id.* at 464. Rather, the directors claimed recovery for emotional distress stemming from the cancellation of their insurance policies and potential losses.

75 *Oscar*, 939 F.2d at 812 n.5 (citing 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 3, at 10 (9th ed. 1987)).

76 *Id.* at 812 (footnote omitted). Actually, plaintiffs live in a rent-controlled district and therefore the rent control statute sets the market price.

court should look to state law for guidance.[77] Under state law, interference with the use and enjoyment of property is a nuisance.[78] Thus, by analogy, the court should look to nuisance law to determine the recoverable damages.

Recovery for a temporary nuisance[79] is the "temporary decrease in the value of the use of the property while the nuisance is continued."[80] The *Oscar* majority stated that the diminution in fair market value determines the recovery.[81] However, plaintiffs live in a rent controlled district and therefore the lease has no fair "market" value. Rather, the rent control ordinance acts as a substitute for the market. Assuming plaintiffs rented their apartments for the base rental price under the ordinance, the diminution in rental value below the base rental price establishes the damages recoverable. Therefore, plaintiffs incurred financial harm to their property, not merely personal injuries, and the Ninth Circuit (en banc) should hold that plaintiffs have adequately pleaded damages.[82]

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77 *See* County of Cook v. Lynch, 620 F. Supp. 1256 (E.D. Ill. 1985). In *Lynch*, to determine a RICO damage recovery, the court analogized to the remedy provided under Illinois law for tortious interference with contract. *Id.* at 1257.

78 CAL. CIV. CODE § 3479 (West 1970).

79 If a nuisance can be abated, the nuisance is temporary. Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866 (Cal. 1985), *cert. denied*, 475 U.S. 1017 (1986); Phillips v. Pasadena, 162 P.2d 625, 626 (Cal. 1945); Guttinger v. Calaveras Cement Co., 325 P.2d 145, 147 (Cal. Ct. App. 1958). Because the drug dealing could be stopped at any time, the nuisance was temporary. Indeed, Barrington Hall is currently closed. *See* Henry Weinstein, *Use of Racketeering Law in Tenant Lawsuit Upheld*, L.A. TIMES, July 27, 1991, at A1; *Berkeley Tenants Allowed to Sue Under RICO Law[-]Ruling May Expand Use of Racketeer Statute*, S.F. CHRON, July 27, 1991, at A13.

80 Spaulding v. Cameron, 239 P.2d 625, 629 (Cal. 1952); Qualls v. Smyth, 307 P.2d 29, 30 (Cal. Ct. App. 1957) ("The measure of damage involved was the depreciation of the rental or use value of the property . . . ."); Guttinger v. Calaveras Cement Co., 233 P.2d 914, 917 (Cal. Ct. App. 1951) ("difference in the rental or usable value of the premises before and after the injury"); Ingram v. Gridley, 224 P.2d 798, 802 (Cal. Ct. App. 1951) (If "value of [the property's] use only is affected, it has been held that the measure of damages is the depreciation in the rental value of the property.") (citations omitted).

81 Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 812 (9th Cir. 1991).

82 Although both the majority and dissent indicate that the plaintiffs are unable to sublet their leaseholds, *id.* at 812 n.5, 815 n.5, the Berkeley Rent Control ordinance does not prohibit subletting. In fact, the ordinance, which states, that a tenant includes "any renter, any tenant, subtenant, lessee, or sublessee of a rental unit, or successor to a renter's interest or any group of tenants, subtenants, lessees, or sublessees of any rental unit, or any other person entitled to the use or occupancy of such rental unit" contemplates the resale of the tenancy. BERKELEY, CAL., CODE § 13.76.040(I) (1990). If plaintiffs sublet, they would actually fall within the ordinance's definition of a landlord. *Id.* § 13.76.040(D). In fact, the sole subletting limitation is that plaintiffs could not charge a

Judge Rymer, dissenting, concluded that plaintiffs did not incur any financial harm and therefore did not have standing under RICO. In fact, Judge Rymer urged that the plaintiffs' only recovery was in state court for nuisance.[83] In California a nuisance is "[a]nything . . . injurious to health, or . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ."[84] There are two types of nuisances: public and private. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons . . . ."[85] However, private citizens may bring a public nuisance action for damages if it is specially injurious to the citizen.[86] To be specially injurious, a private citizen must establish an injury different in kind from injury suffered by the rest of the public. Nevertheless, even if a citizen does not have an injury different in kind, a private citizen can maintain a private nuisance action against an activity that also constitutes a public nuisance[87] if the citizen proves a disturbance of the citizen's rights in land rather than an interference with the rights of the general public.[88] The landowner "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree."[89]

If a house is used for drug activity, the house constitutes a nuisance per se under California law.[90] Either a public official or

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rent above the base rental price. *Id.* § 13.76.100(A). The base rental price only sets a maximum, not a minimum. Thus, plaintiffs can prove damage in the loss of rental value if the pre-nuisance subletting price is greater than the post-nuisance subletting price. *See also infra* note 95.

83 *Oscar*, 939 F.2d at 814-15.

84 CAL. CIV. CODE § 3479 (West 1970).

85 *Id.* § 3480. Remedies for a public nuisance include an injunction or damages. *Id.* § 3491.

86 *Id.* § 3493.

87 Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 355 (Cal. Ct. App. 1971). Under CAL. CIV. CODE § 3481 (West 1970), a private nuisance is any nuisance which is not a public nuisance. However, California case law allows recovery for a private nuisance which is also a public nuisance. *Venuto*, 99 Cal. Rptr. at 355.

88 *Venuto*, 99 Cal. Rptr. at 355.

89 *Id.* (citations omitted); *see also* Johnson v. V.D. Reduction Co., 164 P. 1119 (Cal. 1917); Fisher v. Zumwalt, 61 P. 82 (Cal. 1900); Lind v. City of San Luis Obispo, 42 P. 437 (Cal. 1895); Biber v. O'Brien, 32 P.2d 425 (Cal. Ct. App. 1934); Willson v. Edwards, 256 P. 239 (Cal. Ct. App. 1927).

90 CAL. HEALTH & SAFETY CODE § 11570 (West 1991).

> Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor,

a private citizen may bring an action to abate the nuisance and the citizen can recover damages.[91] Because Barrington Hall residents' activities involved drug dealing,[92] the activities satisfy the statutory definition of a nuisance per se. Indeed, even if the activities at Barrington Hall also constituted a public nuisance, which it likely did because it affected so many people, plaintiffs could maintain a private nuisance action because of their proprietary interest in the lease.[93]

Upon proof of a nuisance, plaintiffs can recover actual damages.[94] Plaintiffs could recover property damages for a decrease in rental value[95] as well as "damages for annoyance, inconvenience,

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> or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Id.

A controlled substance is a "drug, substance, or immediate precursor which is listed in any schedule in sections 11054, 11055, 11056, 11057, or 11058." CAL. HEALTH & SAFETY CODE § 11007 (West 1991). These sections list several drugs, including opium, cocaine, and depressants. *Id.* §§ 11055, 11056 (West 1991 & Supp. 1992).

91 *Id.* § 11570 (West 1991); *Id.* § 11571 (West Supp. 1991). Section 11571 states:

> Whenever there is reason to believe that such a nuisance is kept, maintained or exists in any county, the district attorney of the county, in the name of the people, may, or the city attorney of any incorporated city or of any city and county, or any citizen of the state resident in the county, in his or her own name, may, maintain an action to abate and prevent the nuisance and perpetually to enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting the nuisance.

92 Oscar v. University Students Coop. Ass'n, 939 F.2d 808, 810 (9th Cir. 1991).

93 *See* Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 356 (Cal. Ct. App. 1971); PROSSER & KEETON, *supra* note 54, § 90, at 648 ("It is likewise true where there is any substantial interference with the plaintiff's use and enjoyment of his own land, as where a bawdy house, which disturbs the public morals, also makes life disagreeable in the house next door. This makes the nuisance a private as well as a public one . . . .").

94 CAL. CIV. PROC. CODE § 3333 (West 1970) ("[T]he measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.").

95 *See supra* note 82. Judge Rymer, dissenting, argued that the tenants could only recover for personal injuries, not property damages. *Oscar*, 939 F.2d 808. Judge Rymer argued that the plaintiffs were legally incapable of renting their leaseholds, much less renting for higher prices, because their apartments were located in a rent controlled district. *Id.* at 815. Therefore, she concluded that the rental value was zero and could not be diminished. Further, Judge Rymer urged that plaintiffs "allege only that '[a] reasonable person would have a reduced desire to rent plaintiffs' apartments' in general, not that the plaintiffs themselves were actually legally capable of renting. Indeed, given

and discomfort,[96] . . . actual injuries to the land, . . . and costs of minimizing future damages."[97] Thus, the plaintiffs have a state law nuisance claim. However, RICO does not supersede state law,[98] and therefore plaintiffs can bring both a nuisance claim for personal injuries and either a state nuisance claim or a RICO claim for property damages.[99]

VI. CONCLUSION

Because RICO does not define property, the *Oscar* court appropriately looked to California law to determine whether the plaintiffs had a property interest in their leasehold. Further, the defendants' drug-related activities interfered with the use and enjoyment of plaintiffs' leasehold; and in fact, the defendants were the sole cause of the diminution in value of the leasehold. As a policy matter, the court should affirm the panel's decision that the plaintiffs adequately pleaded an injury to their property caused by the defendants' racketeering acts as Congress intended RICO to address narcotic activities[100] and imposing liability would further

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that the apartments were rent controlled, the plaintiffs likely could not sublease them." *Id.* at 815 n.5. However, nothing in the Berkeley rent control ordinance prohibits subletting. *See supra* note 82. In fact, the rental value is not zero; the rental value is the value at which the tenants could sublet. Thus, if a nuisance caused a reduced desire to rent the leasehold and consequently a market reduction in the subletting price, the diminution in rental value reflects the property damages.

96 *See also* Acadia, California, Ltd. v. Herbert, 353 P.2d 294 (Cal. 1960); Qualls v. Smyth, 307 P.2d 29, 30 (Cal. Ct. App. 1957); *but see* Institoris v. City of Los Angeles, 258 Cal. Rptr. 418, 424 (Cal. Ct. App. 1989) ("Emotional distress damages . . . are not available in an action on private nuisance.") (citation omitted).

97 San Jose v. Superior Court, 525 P.2d 701, 712 (Cal. 1974) (citations omitted).

98 Congress stated that "[n]othing in RICO shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided" in RICO. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947 (1970).

99 Under RICO, neither abatement nor personal injuries are available. On the abatement issue, see Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988) and Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). For personal injury analysis see Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 509 (1985) (Marshall, J., dissenting) ("[T]he statute permits recovery only for injury to business or property. It therefore excludes recovery for personal injuries."); *see also* Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3rd Cir. 1991); Fleischhauer v. Feltner, 879 F.2d 1290, 1300 (6th Cir. 1989); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989); Grogan v. Platt, 835 F.2d 844, 846-47 (11th Cir 1988); Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986); Abrams, *supra* note 33, at 27-28 (1987).

100 *See supra* note 70.

RICO's deterrent effect.[101] The *Oscar* plaintiffs request only recovery for property damages caused by such drug dealing and therefore the *Oscar* plaintiffs should succeed on the dismissal motion.

Although plaintiffs can recover for personal injury under nuisance law and for property damage under either nuisance law or RICO, plaintiffs are not limited to a state law claim for property damages because RICO does not supersede state law.[102] RICO is a valuable addition to the private citizen's fight against the invasion of drugs in our neighborhoods and the synergistic effect of RICO combined with nuisance law will greatly enhance this fight. The plaintiffs' claim is precisely within RICO's dominion, and upon rehearing, the Ninth Circuit (en banc) should affirm the *Oscar* panel decision.

Michelle J. Stahl

101 *See supra* note 71.
102 *See supra* note 98.